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In the

Supreme Court of the United States

ERNEST A. JANIK, JR., individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, individually, on behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik,

Petitioners,

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; and IAS CLAIM SERVICES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

JAMES J. S. JOHNSON, ESQ.
Counsel of Record

P.O. Box 2952
Dallas, Texas 75221
817-430-9305 telephone
817-430-9306 FAX

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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FACT ISSUES

Amica's Brief in Opposition often misstates material facts that were genuinely disputed at the summary judgment level. In fact, Amica avoids most of Petitioners' legal arguments by filling half of Amica's pages with a highly skewed packaging of so many **half-truths** and misleading misstatements of "fact", that Petitioners' page-limit herein prevents a comprehensive seriatim refutation thereof (but this could be done at a later phase herein). However, an example or two may illustrate how misleadingly Amica has portrayed the salient "facts".

E.g., Amica implies (at 3-16 of its Brief) that it had a legal right to withhold payment of the Janiks' insured loss claim by conditioning such payment on Mr. Janik signing a "proof of loss" form (re Amica's demands, see Trial Record at pp. 6012-6013, saying):

> Enclosed is the Proof of Loss [*form*] for the policy limits of $60,000.00 which you need to sign and return to me. Upon receipt of the signed Proof of Loss, the draft in the amount of $44,110.35 will be forwarded to you. . . .
>
> [*and again, 12 days later*]
>
> Amica is ready to issue the two drafts of $44,110.35 and $15,889.65 for your policy limits upon receipt of the signed Proof of Loss previously forwarded to you. . . .

But the above-quoted demands (dated 2-23-1994 and 3-7-1994) were asserted in **bad faith**, since Amica had already waived its right to insist on using such a form. Mr. Janik FAXed a notice of property loss to Amica on 11-4-1993, 4 days after the loss event (which occurred

10-31-1993). Amica did not request a proof of loss from the Janiks until 2-23-1994, obviously more than "15 days" after Mr. Janik FAXed his 11-4-1993 notice to Amica. Amica's insurance contract provides that "we [Amica] must request a signed sworn proof of loss within 15 days after we receive your written notice [of a claimed loss], or we [Amica] waive our right to require a proof of loss".

In fact, the form Amica wanted signed would have waived or compromised the Janiks' claims for extra-contractual damages (not capped by the "policy limits").

Thus, 15 days after 11-4-1993, Amica waived the right to insist on Mr. Janik signing a proof of loss form. See trial exhibit PX-519JJ, shown at 5th Circuit Appeal 98-11369 Record Excerpts' Tab O, buttressed by trial testimony admissions (shown at *id.*'s Tab N), and by Mr. Janik's notice FAX of 11-4-1993 (shown at *id.*'s Tab Q), and by PX-519J at *id.*'s Tab P (contract term: "If we notify you that we will pay your claim, or part of your claim, we must pay within 5 business days after we notify you"). Thus, the "facts" recited in Amica's Brief actually demonstrate Amica's inexcuseable **economic coercion, breach of contract, DTPA violations** (including unconscionability), **unfair insurance practices**, and **bad faith** in delaying payment on the Janiks' noticed property loss claim.

In fact, the delays in communications by Amica and IAS/Nobel were specifically found, by the jury, to be examples of "**unfair or deceptive act[s] or practice[s]**" violating the Texas Insurance Code. See Doc 393 [Verdict] at pp. 19, 22. The trial court's JNOV improperly discarded these jury factfindings, as the record in 5th Circuit Appeal 98-11369 shows.

The Janiks were ambushed at trial with surprise testimonies "at the midnight hour", – some defense experts even parroting the same phrases verbatim, – from supposedly independent outside expert witnesses. The many unfair surprises at trial demonstrated bad faith discovery abuse/concealment and/or "coached" witness collusion, as noted below, since the surprise testimonies were not included in Rule 26(a)(2)(B) expert reports, were not disclosed per Rule 26(a)(1), and were not supplemental per Rule 26(e)(1).

The two IAS/Nobel defendants ("IAS/Nobel") have failed to file a Brief in Opposition herein, so their silence regarding the facts asserted herein by the Janiks against IAS/Nobel are uncontested. IAS/Nobel, to date, has not served the undersigned with any kind of a brief herein. Pursuant to Supreme Court Rule 15.2, IAS/Nobel's failure to file a Brief in Opposition is deemed to waive any objections regarding facts asserted against the two IAS/Nobel defendants via the Janiks' Petition.

ARGUMENTS

A. ***By failing to file a Brief in Opposition, both IAS Claim Services, Inc. and Nobel Service Corporation are deemed to not dispute the legal points asserted herein by the Janiks,*** **as to legal points asserted by the Janiks in their Petition herein.** See Supreme Court Rule 15.2 (regarding respondent's duty to object re legal issues).

B. ***Amica's overall response point is a "straw-man" distraction (an inapplicable legal standard), because Fed.R.Civ.P. Rule 60(b)(3)'s term "other misconduct" is***

***not limited to proof of "fraud" scienter* – in fact, this is the very issue on which Petitioners have documented a "split" in the federal circuits.** See, accord, cases from federal circuits other than the 5th Circuit, e.g., *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998); *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1993); *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994); *United States v. One Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981); *Fraige v. American-Nat'l Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993), – **in contrast to the 5th Circuit's practice of scrupling "misconduct" by a "it-must-be-so-egregious-it-amounts-to-fraud" standard for Rule 60(b)(3) motions,** as illustrated by *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341-1346 (5th Cir. 1978) ("sabotage" of trial process illustrating the 5th Circuit's de facto "it-must-be-fraud" norm).

But, by the "plain language" of Rule 60(b)(3) ("other misconduct"), the 5th Circuit may **not** burden the Janiks to prove "fraud" as to defendants' discovery non-compliances, because non-fraudulent forms of "other misconduct" can justify Rule 60(b)(3) relief, apart from the "why" behind non-compliances (including non-disclosures and non-supplementations of Rule 26(a)(2)(B) information). *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994). As a practical matter, due enforcement of Rule 60(b)(3) provides an incentive for advocate compliance with the rules, and a disincentive for "conveniently" failing to comply with them. *Fraige v. American-Nat'l Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993); *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998) (***using Rule 60(b)(3) to void surprise-tainted "trial by ambush"***). In effect, refusing to extend application of Rule 60(b)(3) to non-fraudulent "other misconduct" renders the rule's phrase

"other misconduct" pleonastic, – *Anderson v. Cryovac*, 862 F.2d 910, 923 (1st Cir. 1988), as quoted in *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 187 F.R.D. 282, 285 (S.D. Tex. 1999), – effectively licensing non-compliance that is difficult to prove later as "fraud".

C-1. **Amica has failed to dispute that this case's pivotal federal question involves a "split" in the federal circuits on the proper usage of Rule 60(b)(3), especially for remedying violations of Rule 26(a)(1) and Rule 26(e)(1).** See Petition at 3, noting "split" and citing Supreme Court Rule 10(a).

C-2. **Amica has failed to dispute that Amica failed to fulfill mandates of Rules 26(a)(1) and 26(e)(1), which include automatic obligations to provide disclosure of "re-cap" notes (i.e., documents mandatorily discloseable wholly apart from any discovery requests propounded by the plaintiffs), – and such withheld Rule 26-mandated documents prejudiced the Janiks' ability to oppose a partial summary judgment.** Amica's own outside expert quoted excerpts of the intentionally withheld "re-cap" notes in his Rule 26(a)(2)(B) report, yet the Janiks were blocked from using those notes at the Rule 56 phase. Amica's only mention of a Rule 26(a)-based duty (see Amica Brief at 25) alludes to a testifying expert's duty of an expert to avoid testifying "outside" of his expert report, which pertains to Rule 26(a)(2)(B). This tellingly side-steps the Rule 26(a)(1)/26(e)(1) duties of defendants to fairly disclose all documents that pertain to the facts put in issue by the pleadings, – inexcuseably evading defendants' duties under Rule 26(a)(1) to disclose all documents (initially and by supplements) "relevant to

disputed facts alleged with particularity in the pleadings". See Doc #443 at 8, 9-19, & Petition for Certiorari at 7-8. *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998) (***unfair surprise from trial expert who opined on a new topic of testimony frustrated the disclosure principle regulating expert reports, being "highly prejudicial", thus justifying Rule 60(b)(3) reversal and remand for new trial***).

The trial court, the appellate panel, and the defendants have *all* repeatedly ignored the mandatory and automatic nature of these rule-specified disclosure obligations, – despite heavy emphases by the Janiks about the automatic nature of Rule 26(a)(1) and Rule 26(e)(1), due to disputed fact topics raised by the Janiks' trial court pleadings. See, e.g., 5th Circuit Opening Brief at 29-31 & 35-39; 5th Circuit Record Excerpts' Tab H, showing Doc #447 (esp. at 4-6); 5th Circuit Reply Brief at 10, 21, & 27; 5th Circuit Petition for Panel Rehearing at 2, 4-5; Petition for Certiorari at 7-8, citing applicable paragraphs in the Janiks' 3rd Amended Complaint. See also, accord, Janiks' 11-15-1999 Motion for Rehearing (**Doc #443**).

C-3. **Amica has failed to dispute that this case involves a "tilted" jury selection process (via screening out prospective jurors who ever felt cheated by an insurance company, as opposed to ever having been cheated by defendant Amica)**, frustrating Due Process. See Petition at 4-5; 5th Circuit Opening Brief at 49.

C-4. **Amica has effectively admitted, via its *volte-face* regarding collusion/coaching of the joint defense witnesses, that the defendants' jointly retained outside experts "exchanged" testimony information, and thus**

they sang the same undisclosed song at trial. The testimony surprises by the joint defense experts were not in their Rule 26(a)(2)(B) reports, not disclosed per Rule 26(a)(1), and not supplemented per Rule 26(e)(1). Defense experts' new and collusive "lyrics" were unfair surprises at trial. See Petition at 4-5; Doc 3443 at 59. How does Amica explain coincidentally similar or verbatim-identically-phrased "lyrics" by such defense experts, in light of there being no Rule 26(a)(1)/(e)(1) disclosures? Such parroted refrains were "anecdotal information exchanged among the various defense witnesses." See Amica's 5th Circuit Brief at 35-36.

D. **Amica misstates the legal error related to "#1 in customer satisfaction"** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. Doc #443 at 5, 9-10, 20-24, & Petition at 4, 9, 13, regarding evasive/misleading responses to discovery requests.

E. **Amica misstates the legal error about the confusing identity of who its agent "IAS" was**. See Argument C-2 above, regarding witness collusions. Also, discovery requests should have "trapped" this information. See Doc #443 at 6, 10-12, 24-32, & Petition at 4, 11-12, regarding obstructionist discovery responses, unfair Rule 56 motion practice, and trial testimony surprises.

F. **Amica misstates the legal error regarding withholding of expert-used "re-cap" notes** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. See Doc #443 at 4-6, 17-18, 39-43, & Petition at 4, 10, regarding discovery requests cites.

G. **Amica misstates the legal error regarding the so-called "100% germ-free" cleaning demand** surprise testimonies. See Argument C-2 above, regarding witness collusion. Also, discovery requests should have "trapped" this information. See Doc #443 at 5, 18-19, 43-48, & Petition at 4, 19, regarding obstructionist responses.

H. **Amica misstates the legal error regarding how its witnesses, including outside experts, coincidentally testified about so-called "generally accepted claims handling practices" and its supposed policy of giving its insureds' the "benefit of the doubt", since these surprises violated Rules 26(a)(2)(B), 26(a)(1), and 26(e)(1).** See Doc #443 at 5, 10, 12-17, 20-24, 32-39, & Petition at 4, 18-21. Regarding Rule 26(a)-mandated disclosures and trial expert misconduct problems, see *Musselmann v. Phillips*, 176 F.R.D. 194, 198-199 (D. Md. 1997); *BCF Oil Refining v. Consolidated Edison Co. of N.Y.*, 171 F.R.D. 57, 65 (S.D.N.Y. 1997).

I. **Amica misstates the legal error regarding the unfairly surprising trial testimonies of the report-straying joint defense experts.** See Doc #443 at 6-7, 50-51. Unfair surprises at trial by testifying experts sometimes cannot be cured by a sustained objection or continuance. Cf. *Licciardi v. TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998). Rule 26(e)(1) violation "misconduct", such as occurred in the Janik case, should be disincentively thwarted by awarding Rule 60(b)(3) relief. See *Klonoski v. Mahlab*, 156 F.3d 255 (1st Cir. 1998); *Viskase Corp. v. American Nat'l Can Co.*, 979 F.Supp. 697, 700 (N.D. Ill. 1997).

J. **Amica misstates the legal error regarding the Rule 60(b)(3)'s burden of proof standard.** A case of discovery evasiveness that prejudices a plaintiff, even though it is not committed with "nefarious intent or purpose", is fair game for Rule 60(b)(3) relief. See *Anderson*, 862 F.2d 910 (1st Cir. 1988). So, Rule 60(b)(3) does not require the Janiks to prove a "fraud on the court" by Amica (or by IAS/Nobel). Moreover, the proper test is not whether the "misconduct" was outcome-determinative. *Fraige*, 996 F.2d at 299; *Square Construction Co. v. Washington Metro Area Transit Authority*, 657 F.2d 68, 72 (4th Cir. 1981). The Janiks clearly and convincingly demonstrates prejudice to their right to "fully and fairly" litigate their case. See Doc #443 at 51-68, buttressed by Doc #447 at 3-7 & Tabs A-S.

K. **Amica misstates the legal error on 7th Amendment and other constitutional rights issues.** Petitioners indicated in briefs at the 5th Circuit level (Opening Brief at 49-50; Reply Brief at 25) that 7th Amendment problems resulted from defendants' "misconduct", as the term "misconduct" is defined in Rule 60(b)(3). The main 7th Amendment point, here, is a partial summary judgment error. The trial court unfairly granted partial summary judgment and dismissed several common law counts and dismissed *all* DTPA tort counts (as pled by Janiks against both Amica and IAS/Nobel), yet that pre-trial ruling was tainted by unfair surprises caused by "misconduct". See Petition at 10, and at 11-12, and Doc #443 at Exhibit "A" (alluding to Due Process).

For example, summary judgment phase-withheld evidence (*which was disclosure-mandated by Rule 26(a)(1) and Rule 26(e)(1)*) was needed by the Janiks to oppose the Rule 56 motions. Also, the defendants' improper jury

arguments "rung" a jury-tainting "bell" that could not thereafter be "un-rung". See *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1993) ***(reversing a jury trial and a Rule 60(b)(3) motion denial, due to tainting the jury by improper closing argument).*** Moreover, the record indicates defense witness collusion, a 5th Amendment Due Process problem. Such withholdings and collusions combined to comprise Rule 60(b)(3) "misconduct" directly deprived the Janiks of any jury trial as to those dismissed counts, – much less a jury trial with opportunity to "fully and fairly" litigate one's case.

CONCLUSION

This Court should issue a writ of certiorari.

Respectfully submitted,

JAMES J. SCOFIELD JOHNSON, ESQ.
Counsel of record for petitioners (the Janiks)
P.O. Box 2952, Dallas, TX 75221
817-430-9305 telephone;
817-430-9306 FAX

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